Tennessee TEC Ethics Commission

Item 5(c), 3.25.08 meeting.

REVISED STAFF DRAFT (3.24.08)

ADVISORY OPINION 08-XX

Interpretation of T.C.A. § 3-6-301 with respect to the definition of lobbyist and employer of a lobbyist.

Requestors: Senator Doug Jackson
Representative Curry Todd

QUESTIONS

1. If a public relations firm receives compensation to maintain a website for the purpose of promoting or opposing certain legislation, and provides visitors with the option of sending a prepared statement to their legislators urging action, from the website, is the firm required under the Ethics Reform Act ("Act') to register as a lobbyist?

2. If the public relations firm identified in question number one (1) is required to register as a lobbyist, is the association that pays the firm to maintain the website required to register as the employer of that lobbyist ("employer") under the Act?

3. If the public relations firm's failure to register is a violation of the Act, what are the potential penalties or sanctions?

4. If the association's failure to register is a violation of the Act, what are the potential penalties or sanctions?

ANSWERS

1. Yes. Under the facts assumed in the opinion request, a public relations firm that receives compensation to maintain a website for the purpose of promoting or opposing certain legislation is required to register as a lobbyist under the Act.

2. Yes. Under the facts assumed in the opinion request, the association paying the firm to maintain the website must register as the employer of the public relations firm.

3. If the public relations firm failed to register within seven days after becoming a lobbyist, it is subject to civil penalties up to a maximum of seven hundred fifty ($750.00) dollars for failure to register. If the firm is or was engaged in lobbying knowing or having reason to know that the association was not registered as the employer of the firm, the firm is potentially subject to civil penalties up to the amount of ten thousand ($10,000.00) dollars. If the firm intentionally violated the registration requirement, it is subject to criminal prosecution. A first offense is a Class C misdemeanor, a second offense is a Class B misdemeanor, and a third or subsequent offense is a Class A misdemeanor.

4. If the association failed to register within seven days after the firm commenced lobbying for the association, the association is subject to civil penalties up to a maximum of seven hundred fifty ($750.00) dollars for failure to register. If the association used the services of the firm knowing or having reason to know that the firm was not registered, the association is potentially subject to civil penalties up to the amount of ten thousand ($10,000.00) dollars. If the association intentionally violated the registration requirement, it is subject to criminal prosecution. A first offense is a Class C misdemeanor, a second offense is a Class B misdemeanor, and a third or subsequent offense is a Class A misdemeanor.

FACTS

The following Advisory Opinion is in response to written inquiries from Senator Doug Jackson and Representative Curry Todd. They both ask whether, under the circumstances described in their requests, Seigenthaler Public Relations ("Seigenthaler")[1] is engaged in lobbying on behalf of Wine and Spirits Wholesalers of Tennessee ("Wholesalers") against passage of Senate Bill ("SB") 1977.[2] The requests ask whether Seigenthaler must register as a lobbyist and whether Wholesalers must register as the employer of Seigenthaler.[3] Finally, they ask what potential penalties are provided by law if either entity has violated the Act.

According to the requests, the Wholesalers employed Seigenthaler to oppose passage of SB 1977. Specifically, the Wholesalers hired Seigenthaler for the purpose of organizing the public to contact their legislators in opposition to SB 1977. In this capacity, Seigenthaler has been paid to send direct mail to members of the public encouraging them to oppose the bill. Further, Seigenthaler has been paid to encourage the public to visit a website created by Seigenthaler, www.stopteendrinkingtn.org. The direct mail is sent under the name of the website, is signed by an executive of Seigenthaler, and encourages the recipient to contact listed lawmakers regarding SB 1977. The website addresses issues relating to distribution of alcoholic beverages, including wine. The website also provides visitors a form letter or e-mail to send to legislators to oppose passage of SB 1977.

[1] According to its website (www.seig-pr.com), Seigenthaler is a full service public relations firm specializing in corporate communications. The Wholesalers are not listed as one of its clients.

[2] SB 1977 would amend Title 57, chapter 3 of Tennessee Code Annotated to provide for issuance of licenses to both in-state and out of state entities to ship wine directly to Tennessee consumers age 21 years and older for personal use. The bill is sponsored by Senator Jackson, Representative Todd and other members of the General Assembly. A copy is attached.

[3] Under the Act, each employer must register separately for each lobbyist employed. An explanation of the registration requirements for lobbyists and employers of lobbyists can be found in Tenn. Code Ann. § 3-6-302.

Senator Jackson states he can find no registration statement for Seigenthaler as a lobbyist or the Wholesalers as its employer.[4] Commission staff have verified that no such registrations are on file.

ANALYSIS

Registration Requirement (Questions 1 and 2).

The Act requires, within seven days of engaging in activity causing a person to become either an employer of a lobbyist, or a lobbyist, that person must register with the Commission. Tenn. Code Ann. § 3-6-302(a). T.C.A. § 3-6-301(17) provides, "'lobbyist' means any person who engages in lobbying for compensation." "Lobby," in turn, "means to communicate, directly or *indirectly*, with an official in the legislative branch or executive branch for the purpose of influencing any legislative or administrative action." (Emphasis added.) T.C.A. § 3-6-301 (15). The question presented is whether the activities described amount to "indirect" communication between Seigenthaler and officials in the legislative branch, thus requiring Seigenthaler to register as a lobbyist.

The Act regulates those who are compensated to "communicate" with an official in the legislative or executive branch for the purpose of influencing legislative or administrative action. "Communicate" is not defined in the Act. In construing the Act, the Commission must ascertain and give effect to the legislative intent without unduly restricting or expanding the Act's coverage beyond its intended scope.[5] "The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language."[6]

The natural and ordinary meaning of "communicate" is "to have an interchange of ideas and information."[7] The question is whether the provision of form letters and e-mails to website visitors, together with the provision of electronic facilities for sending those letters and e-mails to legislators, amounts to "indirect" communication with legislators. To resolve this issue it is important to consider the definition of "indirect" in the context of communication.

The word "indirect" is not defined in the statute.[8] One Tennessee court, faced with a statute that did not define this term, consulted the dictionary as follows:

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[4] Lobbyist and employer of lobbyist registration statements are publicly available and searchable at the Commission's website; www.state.tn.us/sos/tec. According to the Commission's records, Seigenthaler is not registered as either a lobbyist or an employer of a lobbyist. The Wholesalers are registered as an employer of a lobbyist for three lobbyists, none of whom appear to be employed or associated with Seigenthaler.

[5] *Sallee v. Barrett,* 171 S.W.3d 822 (Tenn.2005); *McGee v. Best,* 106 S.W .3d 48 (Tenn.Ct.App.2002).

[6] *State v. Blackstock,* 19 S.W.3d 200, 210 (Tenn. 2000).

[7] *Webster's II New College Dictionary*, 233 (3rd ed. 2005).

[8] Other statutes do contain such a definition. E.g., Tenn. Code Ann. § 57-3-406 (indirect interest in the sale of alcoholic beverages); Tenn. Code Ann. § 12-4-101(b) (indirect interest creating conflict of interest).

> "Indirect" is not defined in *Black's,* but is defined in *Webster's* as "not direct: ... (1): deviating from a direct line or course: not proceeding straight from one point to another: proceeding obliquely or circuitously: roundabout." *Id.* at 1151. Thus, Tenn. Code Ann. § 5-14-114 prohibits a county official from having any personally favorable interest in a county contract, regardless of whether that interest is direct or circuitous. While the statute prohibits a broad range of conduct by county officials, it is not so vague that the prohibited conduct cannot be ascertained.

State v. Whitehead, 43 S.W.3d 921, 929 (Tenn. Crim. App. 2000) (dicta—statute held unconstitutional under equal protection clause).

The form letters and e-mail described in the requests are not direct communications because they do not go directly from Seigenthaler to the legislators. Instead, Seigenthaler is paid to promote the defeat of legislation by encouraging the public to communicate with their legislators. Seigenthaler is paid to affect legislation using the public as a resource. Therefore, Seigenthaler, as an entity engaged in such communication for compensation, and for the purpose of influencing legislative action, must register as a lobbyist under the Act.

This conclusion is supported by the analysis used by courts. In the seminal case of *United States v. Harriss*, the Supreme Court noted lobbying could be construed to include "artificially stimulated letter campaigns." 347 U.S. 612, 620, 74 S.Ct. 808, 813 (1954)[9]. Similarly, the Washington Supreme Court concluded that to interpret "indirect" as failing to require disclosure of such funded letter campaigns "would leave a loophole for indirect lobbying without allowing or providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude." *Young Am. for Freedom, Inc v. Gorton*, 522 P.2d 189, 190-192 (Wash. 1974).

In considering whether the described activities are included in the definition of lobbying, it is also appropriate to consider the purpose of the Act. "In ascertaining the intent of the legislature, this Court may look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment."[10]

The stated purpose of the Act is as follows:

> It is the intent of the general assembly that the integrity of the processes of government be secured and protected from abuse. The general assembly recognizes that a public office is a public trust and that the citizens of Tennessee

[9] In order to avoid a constitutional issue, the court narrowly construed the Federal Lobbying Act of 1946 to regulate only "direct" lobbying activities. *Harriss*, 347 U.S. 612, 620-621, 74 S.Ct. 808, 813-814 (1954). The court noted that Congress intended broader regulation. *Id*. A footnote to the opinion cites Congressional findings regarding the activities of lobbyists. *Id*. at 621, 841, n. 10.

[10] *State v. Edmondson*, 231 S.W.3d 925 (Tenn. 2007), quoting State v. Collins, 166 S.W.3d 721, 726 (Tenn.2005) (internal quotation marks and citation omitted).

> are entitled to a responsive, accountable, and incorruptible government. The Tennessee Ethics Commission is established to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct.

Tenn. Code Ann. § 3-6-102.

In both *Harriss* and *Gorton*, the courts discussed the need for an informed public. *Id*.; *Harriss*, 347 U.S. at 620. Restating the importance of government transparency, the Supreme Court has repeatedly quoted its own language in *Grosjean v. Am. Press Co.*, which states, "informed public opinion is the most potent of all restraints upon misgovernment." 297 U.S. 233, 250, 56 S.Ct. 444, 449 (1936).

Requiring Seigenthaler to register as a lobbyist under the circumstances described above would serve to "increase the transparency of state and local government" and would thus be consistent with the purposes of the Act.[11] Seigenthaler has been paid to establish a website for the purpose of opposing passage of SB 1977. While this is not enough to require registration, Seigenthaler's website goes further and attempts to influence legislative action by communicating, albeit indirectly, with legislators.[12] Seigenthaler's website not only encourages the public to contact their legislators on SB 1977, the website offers visitors the chance to send a prepared communication to legislators who represent the visitor. The prepared communication asks the legislator who receives the communication to oppose the passage of SB 1977, and gives reason(s) for opposing the bill. This action is very similar to the, "artificially stimulated letter campaign" alluded to in *Harriss*, and the "indirect lobbying" discussed in *Gorton*. 347 U.S. at 620; 522 P.2d at 192.[13] If it is assumed that Seigenthaler has been retained and compensated to produce the website, then Seigenthaler is a lobbyist and is required to register with the Commission pursuant to T.C.A. § 3-6-302. Wholesalers would likewise be required to register as an employer of a lobbyist pursuant to T.C.A. §§ 3-6-302 if it, in fact, retains and compensates Seigenthaler for these activities.

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[11] The Reform Act serves the important governmental interest of protecting the integrity of the government process. *Kimball v. Hooper*, 665 A.2d 44, 47 (Vt. 1995). As stated by the United States Supreme Court, "disclosure requirements…appear to be the least restrictive means of curbing the evils of…ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1 (1976). The Act does not express a preference for a particular viewpoint, or regulate the message any lobbyist or employer may express. The Act regulates only lobbyists acting in their capacity as lobbyists attempting to influence legislative action or administrative action

[12] Thus the activities go far beyond the simple legislative monitoring activities before the Commission in Advisory Opinion 06-03. That opinion concluded that persons who are employed to monitor legislation without attempting to influence legislative or administrative action are not lobbying and do not need to register.

[13] One federal court considering this language defined an "artificially stimulated letter campaign" as "'imitating propaganda', i.e., a campaign to stimulate the public to directly contact legislators by letters or telegrams, etc." *Comm'n on Indep. Coll. and Univ. v. N.Y. Temp. State Comm'n on Regulation of Lobbying,* 534 F. Supp. 489, 495 n. 6 (N.D. N.Y. 1982)(citation to *Harriss* omitted). The court there upheld regulation of "indirect" lobbying against a constitutional overbreadth challenge on the grounds that the regulation went no further than the activities enumerated in *Harriss*. 534 F. Supp., at 496-97 (stating, *inter alia*, that the court in *Harriss* "held that indirect lobbying, in the form of campaigns to exhort the public to send letters and telegrams to government officials, could be included within the definition of lobbying activities").

Potential Penalties or Sanctions (Questions 3 and 4)

Senator Jackson and Representative Todd ask what potential penalties could be imposed on the employer and the lobbyist for failure to register. Both are subject to civil penalties of $25 per day, up to a maximum of $750, for failure to timely register. T. C. A. §§ 3-6-306 (a)(1)(A) and (a)(2)(A). The employer is subject to a penalty of up to $10,000 if it uses the services of a lobbyist knowing or having reason to know that the lobbyist in not registered. T.C.A. § 3-6-306(a)(1)(B). The lobbyist is subject to a penalty of up to $10,000 if he or she lobbies on behalf of an employer knowing or having reason to know that the employer has not registered. T.C.A. § 3-6-306(a)(2)(B). An intentional violation of the registration requirement is a criminal offense. A first offense is punishable as a C misdemeanor, and a second offense is punishable as a B misdemeanor. Third and subsequent offenses are punishable as A misdemeanors. T.C.A. § 3-6-306(d).

Both Seigenthaler and Wholesalers are also potentially subject to an injunction to prevent continued violation. T.C. A. § 3-6-306(e). Violation of an injunction can be punished as criminal contempt of court. Tenn. Code Ann. § 29-9-102.

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